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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re DARIN F., a Person Coming Under
the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

TERESA E.,

Defendant and Appellant.

E039501

(Super.Ct.No. INJ016482)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy J. Heaslet,
Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and
Appellant.

Joe S. Rank, County Counsel, and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent, Riverside County Department of Public Social Services.

Lori A. Fields for Minor.

Alexander, Berkey, Williams & Weathers and Meredith D. Drent and Thomas Weathers for Minor's Tribe, Morongo Band of Mission Indians.

Appellant Teresa E. (mother) appeals from the juvenile court's order terminating her parental rights as to her son, Darin (the child). She argues that the order should be reversed because the Department of Public Social Services (DPSS) completely failed to comply with the requirements under the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We note that the Morongo Indian tribe (the tribe) intervened in the proceedings below. The tribe, along with DPSS, now urges us to affirm the court's order. We affirm.¹

FACTUAL AND PROCEDURAL BACKGROUND

On November 2004, DPSS filed a Welfare and Institutions Code section 300² petition on behalf of the child and his half-sister, M., who is not a subject of this appeal.

¹ Counsel for the child filed a letter brief on June 5, 2006, joining in the respondent's briefs filed by DPSS and the tribe.

² All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

The petition alleged that the child and M. (the children) were at risk of suffering harm because of the domestic violence and substance abuse histories of mother and father.³ (§ 300, subd. (b).) Mother and the child tested positive for amphetamines when the child was born. He was six days old when the petition was filed.

Detention Report and Hearing

In the detention report, the social worker stated that ICWA applied since father was a member of the tribe. The social worker sent a formal notice of the proceedings to the tribe. In addition, the social worker reported that she interviewed M., who was five years old at the time. M. said that mother and father used drugs in front of her and that she saw father slap mother in the face all the time.

The detention hearing was held on November 16, 2004. The court detained the children in foster care.

Jurisdiction/Disposition Report and Hearing

In a jurisdiction/disposition report dated December 9, 2004, the social worker stated that father's whereabouts were unknown. She attempted to contact him several times by writing him letters and leaving messages with his mother, but he never responded. The social worker did speak with mother, who admitted that she used drugs right before she went into labor with the child. She also admitted that she and father argued; however, she denied that M. ever saw them argue or use drugs. Mother admitted

³ Father is not a party to this appeal.

that she had never been employed, and that she relied upon the paternal grandmother to pay her bills.

The social worker attached a case plan to the report. Mother and father were both required to participate in general counseling, complete a domestic violence program, complete a parenting education program, participate in a substance abuse program, and submit to random drug testing.

The jurisdiction/disposition hearing was held on December 9, 2004. An attorney representing the tribe was present and stated that the child was eligible for tribal membership, and thus ICWA applied.⁴ The tribe's counsel stated that the tribe would be willing to waive the requirement that the court hear testimony from an ICWA expert before deciding whether returning the child to either parent would cause him harm, provided that the child was placed with the paternal grandmother, who was a tribal member. The court accepted the waiver. The court also found the allegations in the petition true and made findings pursuant to section 361, subdivision (c)(1) that there would be a substantial danger to the physical health, safety, protection or physical or emotional well-being of the child if he were returned home. For ICWA purposes, the court found by clear and convincing evidence that the current custody of the child by the parents was likely to result in serious emotional, physical damage to the child. The child

⁴ The minute order incorrectly states that the child did not come under ICWA.

was eventually placed with the paternal grandmother on December 21, 2004. The court also ordered reunification services for mother and father.⁵

On December 13, 2004, the tribe submitted a Notice of Tribal Intervention to the court. On January 7, 2005, the court granted the tribe's motion to intervene. The court later determined that the child came under the provisions of ICWA.

At a hearing on February 7, 2005, the court found that an Indian expert was needed to confirm removal of the child from father and, accordingly, ordered DPSS to engage the services of an expert.

On February 24, 2005, the declaration of Indian expert and social worker, M. Morning Star Myers, was filed (the declaration). The declaration recommended that the child remain placed in Indian relative care and that the paternal uncle be considered for placement. The declaration also stated Myers's opinion that returning the child to either parent would place him at risk for serious emotional and physical danger.

Six-Month Status Report and Hearing

The social worker who wrote the six-month status review dated June 9, 2005, was assigned to mother's case on March 24, 2005. She reported that mother had only contacted her once on April 7, 2005. Mother scheduled an appointment with her but failed to appear. Mother told the social worker that she had completed a substance abuse

⁵ The minute order incorrectly states that DPSS was not to provide services to father.

program but did not provide any certification. Mother had not visited the child in the last three months.

The social worker further reported that father was incarcerated and was scheduled to be released on May 14, 2005. The social worker had written to father, but he never responded. The social worker recommended that reunification services be terminated and that a section 366.26 hearing be set.

In an addendum report, the social worker reported that she reached mother on June 1, 2005. Mother did not explain why she had not been in contact with the social worker. Mother again said she completed a substance abuse program, but stated that “the program closed.” She admitted to drinking alcohol recently but denied any drug use. Although the social worker advised mother to start an aftercare program and to drug test, mother failed to do either.

Regarding father, the social worker reported that he called her on May 19, 2005, and left her a message confirming that he had received a letter and his case plan from the social worker but had not started a substance abuse program. The social worker opined that father had not made any attempts to complete his case plan, in or out of prison. She referred him to a substance abuse program and requested that he drug test on June 2, 2005.

A contested six-month review hearing was held on July 5, 2005. After reading the social worker’s reports, the court found, by a preponderance of the evidence, that: 1) return of the child to the parents’ custody would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child; 2) DPSS made

reasonable efforts to make it possible to safely return the child home; and 3) DPSS provided reasonable reunification services. The court also found that the parents failed to make substantive progress in their case plans. The court terminated reunification services and set a section 366.26 hearing for December 6, 2005.

Section 366.26 Report and Hearing

The social worker filed a section 366.26 report on October 19, 2005, in which she reported that mother had not visited the child for the last six months. Although the social worker attempted to contact her for visits, mother failed to respond. Similarly, father had not visited the child or called to inquire about his well-being. The social worker recommended termination of parental rights based on the findings at the six-month hearing.

In an addendum report filed on October 28, 2005, the social worker stated that mother had not completed any portion of the case plan. She would start a program but not finish. Mother had recently enrolled in an inpatient treatment program on October 24, 2005, but it was unknown when and if she would complete it. The social worker reported that mother had maintained a relationship with father and was pregnant with his child. Despite their history of domestic violence, mother did not complete a domestic violence program, as required. In addition, the social worker attached the declaration of an Indian expert witness, Erin M. Lubo-Majel. She opined that reasonable efforts had been made to prevent removal of the child from his home, and that the child should remain in his current relative placement with the paternal uncle and aunt. She opined that adoption or guardianship would be in the child's best interest.

The section 366.26 hearing was held on November 1, 2005. The court adopted the findings and promulgated the orders as they appeared in the social worker's reports and terminated mother's and father's parental rights.

ANALYSIS

There Was Sufficient Evidence to Support the ICWA Findings

Mother argues that the termination of her parental rights to the child should be reversed because the court did not comply with ICWA's requirements for specific findings and for expert testimony. Specifically, she contends that the court failed to find, beyond a reasonable doubt, that continued custody of the child was likely to result in serious emotional or physical damage to the child, that there was no Indian expert testimony concerning this issue, and that there was insufficient evidence that DPSS made "active efforts" to provide father with reunification services. We conclude that any error was waived, and, in any event, we can imply the findings from the evidence in the record. (*In re Andrea G.* (1990) 221 Cal.App.3d 547, 554-555 (*Andrea G.*))

25 U.S.C. section 1912, subdivision (d) provides that "[a]ny party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Furthermore, subdivision (f) provides that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of

qualified expert witnesses, that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child.”

A. The Evidence Showed That Return of the Child to Mother Would Result in Serious Emotional or Physical Damage to the Child

Mother argues that the court failed to find, beyond a reasonable doubt, that returning the child to her would result in serious emotional or physical damage to the child before terminating her parental rights, and that there was no Indian expert testimony to support such a finding. We note that the court did make the finding by clear and convincing evidence. In any case, mother failed to object to either of these alleged errors below and thus waived these arguments. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411.) “As a general rule, a party is precluded from urging on appeal any point not raised in the trial court. [Citation.] Any other rule would ““permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.”” [Citations.]’ [Citation.]” (*Id.* at pp. 411-412.)

Notwithstanding the waiver, there was ample evidence to imply such a finding. (*Andrea G., supra*, 221 Cal.App.3d at pp. 554-555.) The evidence was clear that rehabilitation and reunification efforts had failed, and that placement of the child with mother would be seriously detrimental, physically and emotionally. The child was initially removed from mother because of her histories of domestic violence and substance abuse. Although mother’s case plan required her to participate in counseling

and complete a domestic violence program, a parenting education program, and a substance abuse program, mother failed to complete anything. She claimed to have completed a substance abuse program, but she could not produce a certificate of completion. Moreover, she failed to drug test for the social worker after her alleged completion. Mother also admitted to drinking alcohol during the period of the six-month review. Furthermore, despite mother's domestic violence history with father, she maintained a relationship with him and was pregnant with his child at the time of the section 366.26 hearing.

Moreover, there was ample Indian expert witness evidence before the court to support a finding that return of the child to mother would result in physical and emotional detriment to the child. In her declaration, M. Morning Star Myers stated that returning the child to either parent would place the child at risk for serious emotional and physical danger. In another declaration, Erin M. Lubo-Majel stated that mother had a history of chronic and severe use of controlled substances and that she failed to complete treatment. Lubo-Majel further stated that mother "continue[d] the lifestyle that has led to her loss of interest in her child," and recommended adoption or guardianship. Although mother correctly points out that these Indian experts did not actually testify at the section 366.26 hearing, their declarations were submitted in lieu of testimony, and mother did not object. The court properly considered these declarations before terminating mother's parental rights.

In addition, mother's relationship with the child was virtually non-existent. She did not visit him for at least six months prior to the section 366.26 hearing and did not even inquire about his whereabouts or well-being.

In sum, the evidence amply supported a beyond-a-reasonable-doubt determination that the continued custody of the child by mother would likely result in serious emotional or physical damage to him.

B. The Evidence Demonstrated That DPSS Made Active Efforts to Provide Services to Father

Mother concedes that active efforts were made to provide her with reunification services. However, she argues that the court failed to find that active efforts were made to provide remedial services and rehabilitative programs to *father*, and that there was insufficient evidence to support such a finding. (25 U.S.C. § 1912, subd. (d).) We disagree.

At the outset, we note that since mother was not injured by the alleged error as to father, she lacks standing to raise this issue on appeal. (*In re Jenelle C.* (1987) 197 Cal.App.3d 813, 818.)

In any case, the court essentially made the required finding. Under ICWA, before terminating parental rights, the juvenile court had to find, by clear and convincing evidence, "that active efforts ha[d] been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts ha[d] proved unsuccessful." (25 U.S.C. § 1912, subd. (d).) At the six-month review hearing, the court found that DPSS made reasonable efforts to make it

possible for the child to return home and that DPSS had offered reasonable services designed to help the parents to overcome the problems that led to the removal of the child. “[T]he standards in assessing whether ‘active efforts’ were made to prevent the breakup of the Indian family, and whether reasonable services under state law were provided, are essentially undifferentiable.” (*In re Michael G.* (1998) 63 Cal.App.4th 700, 714.)

Furthermore, there was sufficient evidence to show that active efforts were made to offer father services. Father simply chose not to participate in the services or in any of the proceedings. The record shows that the court ordered reunification services for father on December 9, 2004. Father was incarcerated, so the social worker sent him a letter and case plan. Father received the letter and case plan in prison but never responded. When he was released from prison on May 14, 2005, he called the social worker and left a message. After several attempts, the social worker contacted him on June 2, 2005. Father reported that he had not started a substance abuse treatment program. The social worker referred him to a substance abuse program and requested him to complete a random drug test. However, father made no attempts to complete the case plan. Moreover, father did not appear in court at either the six-month hearing or the section 366.26 hearing.

Although mother correctly points out that the court did not expressly make the ICWA finding of “active efforts” at the section 366.26 hearing, there was ample evidence to imply such a finding. (*Andrea G.*, *supra*, 221 Cal.App.3d at pp. 554-555.)

C. The Objectives of ICWA Have Been Satisfied

Ultimately, the goals of ICWA have been met in this case. The ICWA was enacted “to protect the best interests . . . and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. . . .” (25 U.S.C. § 1902.) The child has been placed with his paternal uncle, who is a tribal member with ties to the tribal community. It is likely that the child will be adopted by his paternal uncle and aunt. Thus, the child would be involved in his Indian culture. We see no reason under ICWA to reverse the court’s order terminating mother’s parental rights.

DISPOSITION

The judgment is affirmed.

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/s/ Hollenhorst
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.

